

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HOLLAND, JR.,

Defendant-Appellant.

UNPUBLISHED

January 13, 2009

No. 281152

Washtenaw Circuit Court

LC No. 06-000622-FC

Before: Murray, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

On August 7, 2007, after a jury trial, defendant was convicted of one count of armed robbery, MCL 750.529. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to life imprisonment. We affirm.

First, defendant challenges the admissibility of his tape-recorded confession, played for the jury at trial, on grounds that it was involuntary. Defendant moved to suppress his confession in the trial court, which denied his request after a *Walker* hearing.¹

“This Court reviews de novo a trial court’s ultimate decision on a motion to suppress evidence.” *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). We examine the entire record and we make an independent determination whether the confession was voluntary based on the totality of the circumstances. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). We review the trial court’s findings of fact for clear error. *Id.* at 68. We review de novo issues of law, such as the application of a constitutional standard to uncontested facts. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). We defer to the trial court’s determinations regarding the credibility of the witnesses at a *Walker* hearing. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).

“A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights.” *Akins*, *supra* at 564, citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16

¹ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

L Ed 2d 694 (1966). We consider the following nonexhaustive list of factors in making this determination, although no one factor is dispositive:

[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.*, quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

After reviewing the evidence presented at the hearing, we conclude that the trial court's findings of fact were not clearly erroneous, and the totality of the circumstances indicates that defendant's confessions on January 12 and 13, 2006, were voluntary. Defendant was 39 years old when he made his confession; he had some post-high school education, and the interviewers noted that he was articulate. Defendant also had a record of other juvenile and adult convictions, indicating that he had experience with the criminal justice system. In particular, defendant indicated that he had been read his *Miranda* rights and understood them when he was a juvenile. Further, defendant was advised of his *Miranda* rights during a January 6, 2006, interview and requested an attorney, which halted the questioning. This earlier request indicates that defendant understood his rights and how to invoke them. The record also reflects that defendant was advised of his *Miranda* rights on several occasions throughout the interviews on January 12 and 13, 2006, and each time defendant indicated that he understood his rights and signed the waiver form. There was also no evidence of an unnecessary delay in bringing defendant before a magistrate, that defendant was injured, drugged, or intoxicated,² or that defendant was physically abused or threatened with physical abuse.³

We further defer to the trial court's finding that defendant was not suffering from ill health and did not inform the interviewers of any health problems. Instead, the evidence presented at the *Walker* hearing indicated that on January 6, 2006, the day after defendant turned himself in for a parole violation, he exhibited no symptoms of drug withdrawal. Further, defendant's interviewers testified that he did not exhibit symptoms of drug withdrawal during the interviews on January 12 and 13. In addition, no evidence indicates that defendant complained to the prison staff or the interviewers regarding any alleged ailments or that he requested or received medical treatment.

² In particular, defendant testified that he did not request or receive any illegal or legal drugs while in jail.

³ Defendant's interviewers testified that defendant was not physically abused, and defendant did not refute these statements.

We also hold that the trial court's finding that defendant was not deprived of food or sleep was not clearly erroneous. The record reflects that defendant was provided food in the afternoon on January 12, 2006, and breakfast and lunch on January 13, 2006. Harold Raupp, the polygraph examiner, testified that defendant told him that he had eaten. Defendant also acknowledged that he was given food on January 13;⁴ defendant cannot argue that he was deprived of food when he simply chose not to eat the food offered to him. Moreover, although defendant testified that he slept poorly or could not sleep in the holding cell at the Washtenaw County Jail, there was no evidence that the interviewers or the corrections officers purposely deprived him of sleep. In addition, although defendant might have been tired during the interview, the interviewers noted that he was nonetheless coherent, articulate, and indicated that he wanted to proceed with the interview. In fact, Raupp refused to administer the polygraph examination on the night of January 12 even though defendant wanted to continue, because Raupp believed that defendant was too tired and he wanted defendant to rest that night and come back the next day. The next day, defendant exhibited no signs of extreme sleep deprivation and indicated that he wanted to take the polygraph test.

We also find that the trial court did not clearly err in concluding that defendant was not subjected to several hours of coercive questioning. The record reflects that the interviewers originally planned to talk to defendant only regarding his role as a witness in an upcoming murder trial. Years earlier, defendant had told police that the suspected murderer, who was slated to go to trial in February of 2006, told defendant about the 1991 homicide. When the police spoke with defendant in January 2006, however, he changed his story, indicating that he was actually present during the murder when the suspected murderer committed it. The police then wanted to give defendant a polygraph test to verify his statements. During defendant's interview with Raupp before the polygraph examination, defendant volunteered that he had "aces up his sleeve," and that he was the man "they were looking for." Defendant indicated "that he was going to lay it on the table. He was going to lay it all out." Defendant then revealed his participation in crimes about which Raupp had no previous knowledge, and Raupp attempted to redirect defendant's attention to his knowledge as a witness in the murder case. Raupp testified that defendant never answered questions in an automatic manner during these conversations and that he was articulate and eager to proceed.

Additionally, the record reflects that defendant was in jail since January 5, 2006, because of a parole violation, and he was interviewed on January 12 beginning late in the afternoon and ending at approximately 9:00 p.m. Raupp refused to administer the polygraph examination at 9:00 p.m. because defendant looked too tired. The polygraph test and interview on January 13 began at approximately 9:00 a.m. and lasted until approximately 11:00 a.m. or 12:00 p.m. Defendant was given breaks, food, and water. After carefully reviewing the testimony presented at the *Walker* hearing and the portions of defendant's tape-recorded statements played for the trial court, we conclude that the trial court did not clearly err in finding that defendant was not coerced into making a statement and that he was actually speaking in full sentences, explaining why he desired to confess. Based on the record evidence, we defer to the trial court's decision to

⁴ Specifically, defendant testified that he was offered a hamburger on January 13 but was not hungry at the time.

credit the interviewers' testimony and the tape-recorded evidence over defendant's testimony and assertions that he was subjected to hours of coercive questioning. *Tierney, supra* at 708.

Defendant also argues that his request for counsel during an interview conducted on January 6, 2006, is sufficient reason, standing alone, to suppress his statements and confession on January 12 and 13. Once a defendant invokes his right to counsel during custodial interrogation, this request must be honored "*unless the accused himself initiates further communication, exchanges or conversations with the police.*" *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982), quoting *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981) (emphasis in original). This rule also applies where the police subsequently attempt to question the defendant regarding a matter unrelated to the initial interrogation. *Arizona v Roberson*, 486 US 675, 687; 108 S Ct 2093; 100 L Ed 2d 704 (1988).

Regardless, the record reflects that defendant initiated the discussion about his involvement in the case at bar and that he was not being interrogated at the time he confessed. The interviewers only intended to ask defendant about his knowledge as a witness against the suspected murder in a homicide investigation. Raupp knew nothing about defendant's involvement in other crimes, and he tried to redirect the conversation back to defendant's knowledge as a witness in the murder case. An "interrogation" is "express questioning and [] any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). See also *People v McCuaig*, 126 Mich App 754, 760; 338 NW2d 4 (1983) (no interrogation occurred where the police informed the defendant of the charge against him and why the police believed the defendant was responsible, because the police statements were not intended to elicit a response, but to provide information). The questions posed to defendant were directed toward his knowledge as a witness in a homicide investigation in which defendant was not a suspect; these questions were not reasonably likely to elicit information about the case at bar.

Defendant also alleges that his confession is inadmissible because it was induced by a promise. We disagree. The existence of a promise is just one of the circumstances to consider in examining whether, under the totality of the circumstances, the statement was made voluntarily. *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997). Raupp testified that defendant first introduced the topic of speaking with his family, although defendant claims that Raupp brought it up. We find no basis to upset the trial court's determination that Raupp's testimony was more credible on this issue. See *Tierney, supra* at 708. Considering that Raupp had no knowledge of defendant's other crimes before defendant told him, Raupp had no reason to promise defendant anything in order to obtain a confession. In fact, Raupp was unaware that there was even the possibility of obtaining a confession or confessions. In addition, Raupp did not have the authority to grant defendant's request to see his family. To the extent there was any promise, it was merely Raupp's promise to pass along defendant's request to see family to Raupp's supervisors. Accordingly, the record does not support a finding that defendant was induced or coerced into making the incriminating statements, and the trial court did not err in holding that defendant's incriminating statements were not improperly induced by a promise.

Next, defendant argues that the trial court abused its discretion in denying his motion for a new trial because, again, his confession was induced by a promise. We review the trial court's decision to deny defendant's motion for a new trial for an abuse of discretion. *People v Crear*,

242 Mich App 158, 167; 618 NW2d 91 (2000). The trial court abuses its discretion when it selects an outcome that falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). We review the trial court's findings of fact for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 197 (2003); MCR 2.613(C). Because we already addressed defendant's allegations when reviewing the trial court's findings at the *Walker* hearing, we again hold that the trial court did not abuse its discretion when it determined that defendant's confession was not induced by a promise and denied defendant's motion for a new trial.

Defendant also raises a sufficiency of the evidence issue in his question presented in his brief on appeal, but he fails to develop this argument in his analysis. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, defendant has abandoned this claim. Nonetheless, upon viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence to sustain defendant's armed robbery conviction. *People v Wolfe*, 440 Mich 508, 514-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The elements of armed robbery are "'(1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute.'" *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001), quoting *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995), overruled in part on other grounds by *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001). The victim, the barista of the coffee shop that defendant robbed, testified that defendant suddenly moved close to her after inquiring about the price of an item. He demanded money from the cash register and indicated that he had a weapon in his jacket pocket by displaying the handle of what appeared to be a weapon. This objective evidence is sufficient to establish defendant's conviction for armed robbery. See *People v Jolly*, 442 Mich 458, 468-469; 502 NW2d 117 (1993) (requiring objective evidence of the existence of a weapon to establish a charge of armed robbery).

Finally, defendant asserts that the trial court abused its discretion when it sentenced him to life imprisonment. The trial court must identify substantial and compelling reasons to justify a departure from the guidelines. *Babcock*, *supra* at 261-262; MCL 769.34(11).⁵ We review the trial court's findings of fact for clear error. *Id.* at 264. "A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for an abuse of discretion." *Id.* at 264-265, quoting *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).

⁵ MCL 769.34(11) provides: "If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter."

Preliminarily, we find that the trial court erred in holding that it was not required to find substantial and compelling reasons to justify a departure from the guidelines because the armed robbery statute provides that the crime is “punishable by imprisonment for life or for any term of years.” MCL 750.529; MCL 777.16y. In order for a life sentence to be within the guidelines, a life sentence must appear as one of the sentencing options in the sentencing grid cell corresponding to defendant’s Prior Record Variable (PRV) and Offense Variable (OV) scores. *People v Greaux*, 461 Mich 339, 342; 604 NW2d 327 (2000); see also *People v Houston*, 473 Mich 399, 410 n 22; 702 NW2d 530 (2005) (Young, J.). In this case, defendant’s sentencing range corresponded to 135 to 337 months’ imprisonment and did not list “life” as an option. MCL 777.62; MCL 777.21(3)(b).

However, the trial court alternatively held that, if substantial and compelling reasons were required, such reasons existed in defendant’s case because of his extensive criminal history, which was not adequately taken into account by the sentencing variables. The trial court may depart from the sentencing guidelines for substantial and compelling reasons, but these reasons may not be based “on an offense characteristic or offender characteristic^[6] already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b), *People v Hendrick*, 261 Mich App 673, 682; 683 NW2d 218 (2004), aff’d in part and rev’d in part 472 Mich 555 (2005). “[A] ‘substantial and compelling reason’ [is] an ‘objective and verifiable’ reason that “‘keenly” or “‘irresistibly” grabs our attention,’ is ‘of “considerable worth” in deciding the length of a sentence’; and ‘exists only in exceptional cases.’” *Babcock, supra* at 257-258, quoting *Fields, supra* at 62, 67-68. Such reasons are objective and verifiable where they are capable of being confirmed and are “actions or occurrences that are external to the mind of the judge, defendant and others involved in making the decision.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A defendant’s prior criminal record is objective and verifiable. *People v Windall Hill*, 192 Mich App 102, 111; 480 NW2d 913 (1991).

The trial court determined that although defendant’s criminal history was considered in the scoring of the variables, inadequate weight was given to defendant’s extensive criminal history. The trial court did not abuse its discretion in departing from the guidelines based on this substantial and compelling reasoning. Defendant’s PRV score did not adequately account for his multiple felony convictions, which went far beyond what the sentencing variables took into account. Defendant had approximately 17 felony convictions and was being sentenced for approximately nine more felony convictions on the day he was sentenced in this case. In particular, his PRV 7 score was only based on having two or more subsequent or concurrent convictions, and he had already received the maximum points available. MCL 777.57(1)(a). In addition, his PRV 1 score only reflects two prior felony convictions, although he has multiple

⁶ An “offender characteristic” is defined as “only the prior criminal record of an offender.” MCL 769.31(c). “Offense characteristics” are defined as “the elements of the crime and the aggravating and mitigating factors relating to the offense that the legislature determines are appropriate.” MCL 769.31(d).

felony convictions.⁷ MCL 777.51(1). Even if he were awarded 75 points for having three prior felony convictions, which would increase his PRV score from 97 points to 172 points, defendant's sentencing range would not reflect this increase because the "F" column in the sentencing grid only provides a range of "75 + points." MCL 777.62. Defendant's score was already well over 75 points, so increasing that score would have no effect on the calculated guidelines because there was no column past the "F" column to place him in. MCL 777.62. Accordingly, defendant's extensive criminal history was not adequately accounted for in the scoring of the guidelines.

In addition, the trial court properly considered the scoring issues in conjunction with defendant's capacity for reformation, and it determined that defendant's multiple offenses demonstrated that he was on a "crime spree" and "out of control." A departure may be justified where the defendant's extensive criminal history and habitual offender status show that the defendant is not capable of conforming his conduct to the law (i.e., the defendant's "clear inability to reform"). *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).⁸

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis

⁷ The maximum score is 75 points for three or more felony convictions.

⁸ At oral argument, defendant's attorney, with the prosecutor's permission, made an oral motion to remand this case to the lower court to conduct a *Ginther* hearing. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). After accepting and considering this oral motion and reviewing the lower court record, we deny defendant's motion to remand for a *Ginther* hearing.